



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: McHugh/Calumet, a Joint Venture

File: B-276472

Date: June 23, 1997

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DIGEST

1. Protest challenging evaluation of awardee's proposal as technically superior to protester's proposal under factor for past performance of similar projects, based on greater relevance of awardee's projects, is denied where record shows awardee's experience was reasonably determined to include projects more directly comparable to the proposed project.

2. Protest that agency violated Federal Acquisition Regulation § 15.610(c)(6) by not advising protester of adverse past performance reference is sustained as the regulation clearly requires such discussions where, as here, the protester has not otherwise had an opportunity to reply to the information and the record shows a reasonable possibility of prejudice.

DECISION

McHugh/Calumet, a Joint Venture (McHugh) protests the award of a contract to Huber, Hunt & Nichols, Inc. (HHN) under request for proposals (RFP) No. GS-05P-GBC-0015, issued by the General Services Administration (GSA) for construction of a new federal courthouse in Hammond, Indiana. The protester argues that the agency improperly evaluated proposals and failed to conduct adequate discussions.

We sustain the protest.

BACKGROUND

The RFP contemplated award of a fixed-price contract for the construction of a 270,000-square-foot, four-story, limestone-clad courthouse housing seven courtrooms, federal office space, a cafeteria, and a firing range. The solicitation provided for award to the offeror whose proposal provided the greatest value to the government, with price equal to technical factors. The technical factors, in descending order of importance (along with evaluation weighting), were as follows: (1) quality control plan (40 percent), (2) past performance on similar projects (35 percent), and (3) key personnel qualifications (25 percent).

Four proposals were received by the closing time, three of which--including HHN's and McHugh's, the only ones relevant here--remained in the competitive range until the source selection. The agency conducted three rounds of discussions and afforded offerors opportunities to submit revised offers and two rounds of best and final offers (BAFO).

Although the (base) cost of McHugh's final BAFO (\$49,237,200) was lower than HHN's (\$50,263,000), HHN's BAFO received a consensus technical score of 78.3, which was 1.2 points higher than the score of 77.1 received by McHugh's BAFO. While McHugh's technical proposal received slightly higher consensus scores for quality control (32.25 versus 32), which was the most important factor, and key personnel (19.2 versus 18.3), the least important factor, HHN's proposal received a somewhat higher score for past performance (28 versus 25.56), the second most important factor. According to the agency, the evaluated difference with respect to past performance was "the major difference" between the offerors. Specifically, the SSEB concluded that HHN's past performance (1) was more relevant to the proposed project than McHugh's, and (2) showed that the firm is more willing to work as a part of a team in order to keep costs down, the project on schedule, and the building tenants happy. The SSEB determined that the advantages of HHN's technical proposal were worth the associated \$1,026,000 price premium, and that HHN's BAFO offered the greatest value to the government. Upon learning of the resulting award to HHN, McHugh filed this protest.

McHugh challenges the agency's evaluation of, and conduct of discussions with respect to, past performance on similar projects. We find that the evaluation was unobjectionable, but that GSA improperly failed to discuss past performance information with McHugh.

PAST PERFORMANCE ON SIMILAR PROJECTS

The solicitation generally provided for evaluation of past performance based on "the number and complexity of comparable projects associated with the Offeror's key personnel, previous client assessments of Offeror's performance, and the Offeror's team experience in working together on previous projects." The RFP specified the

following "primary considerations": (1) completion on time and within budget; (2) commitment in terms of quality, time and cost; (3) working relationship with owner, including problem resolution and change order execution; (4) working relationship with architect/engineer; (5) scope of services; (6) success in meeting owner's needs and expectations; (7) Occupational Safety and Health Administration record; and (8) references.

Proposals were required to include a one-page description and references for each of two sample projects, completed within the last 5 years, with "similar scope, requirements, and/or complexity" to the project contemplated by the RFP.¹ In addition, GSA reserved the right to consider projects other than the two sample projects. In this regard, the RFP requested offerors to provide summary descriptions, including references, for five completed projects, five current projects, and five of the largest projects for which the offeror was responsible over the past 5 years. Further, the RFP specifically provided that in addition to the references provided by offerors, the agency might inquire about an offeror's projects not referenced in the proposal if it had first-hand knowledge of those projects.

While the agency found McHugh's past and current projects to be "similar in size and budget" and generally "comparable" to the proposed project, it found them to be not "specifically" or "directly" comparable to the proposed project "in complexity or function," and determined that HHN's past and current projects were "significantly more similar" than McHugh's. For example, while McHugh had not completed or worked on any courthouse projects within the past 5 years, HHN had three current courthouse projects, on one of which it was the general contractor, and on the other two was the construction manager.² Likewise, GSA determined that HHN had superior experience with respect to the complexity of the architectural finish of its projects. In this area, the agency concluded that the interior work on HHN's construction contract for the renovation of the Civic Courthouse in San Francisco, California, consisting of a cherry veneer casework paneling system, was "directly comparable" to the interior woodwork of the proposed project, and was more

¹The descriptions were to include project size, award price, space types, major project objectives, building features/systems involved, delivery dates (start and finish), and whether the project was completed on-time, taking into account owner agreed-to negotiated delivery schedule changes caused by contract modifications.

²McHugh listed two courthouse projects--the Illinois Third and Fifth District Courthouses--which GSA considered to be "indicative" of McHugh's abilities, but the agency noted that they were completed in 1989, that is, clearly beyond the 5-year period of consideration provided for in the solicitation. Moreover, the agency determined that these projects were "not nearly similar" to the proposed project because they "did not contain the same level of quality finishes" and were not similar in function. The protester has not specifically disputed these conclusions.

similar to that interior than the architectural finish on any project submitted by McHugh. GSA further concluded that the architectural finishes on one of HHN's sample projects, the San Francisco Library, designed by the same architect who designed the Hammond courthouse, were "very similar to the proposed finishes and details" of the proposed project and demonstrated the firm's "ability to construct the intricate details and finishes" typical of a design by this architect. Additionally, the agency viewed the exterior finish on HHN's second sample project, the Indiana Government Center, as directly comparable to the proposed project, since both have limestone facades. In contrast, the agency considered the complexity of finishes on McHugh's projects as only "similar," and not directly comparable, to the proposed project. For example, the agency viewed the finishes on one of McHugh's sample projects, the Chicago Place Condominium, as only "approach[ing] the level of finishes" for the proposed project.

McHugh maintains that it possesses greater relevant construction experience than HHN on projects similar in size and complexity to the contemplated project. In this regard, according to McHugh, it possesses extensive experience working as a general contractor, which experience, it claims, should have been viewed as more relevant than HHN's experience, which McHugh characterizes as that of a construction manager rather than a general contractor.

In considering a protest against an agency's evaluation of proposals, we will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450 at 7.³

The evaluation in this area was reasonable. As noted by the protester, GSA initially concluded that HHN had more construction management experience than general contractor experience, and evaluated this as a weakness. However, based on HHN's explanation during discussions of the extent of its role and responsibilities when acting as a construction manager, and the benefits of its construction management experience, the agency determined that HHN's experience acting as both a general contractor and construction manager was a strength. In this regard, the agency concluded that HHN's construction management experience "enhances their role as a third party problem resolver" and "makes them more sensitive in fostering good

³McHugh also initially argued that its proposal was improperly downgraded under the quality control factor because it was submitted by a joint venture. GSA responded to the protester's initial argument on this issue in its report on the protest, and to the protester's comments on the report--which recast the argument--in the agency's supplemental report on the protest. McHugh did not dispute the agency's position in its comments on the agency's supplemental report. Under these circumstances, we consider the issue abandoned. Datum Timing, Div. of Datum, Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328 at 5.

working relationships with the architect and construction manager." We find nothing unreasonable in the agency's position that HHN's construction management experience would enhance its ability to maintain working relationships and solve problems, considerations that were specifically recognized as primary considerations under the past performance factor. Moreover, the record indicates that HHN did in fact possess significant general contractor construction experience; the firm was the general contractor on both of its sample projects (the San Francisco Library and the Indiana Government Center), as well as for the San Francisco Civic Center Courthouse. Given also that the scope of services provided was only one of eight primary considerations under the past performance area and, moreover, that the focus of the past performance evaluation generally was the "number and complexity of comparable projects," not the amount of general contractor experience, this aspect of the evaluation is unobjectionable.

DISCUSSIONS

HHN's overall advantage with respect to past performance was based not only on the greater similarity of its prior projects to the contemplated project, but also on its evaluated more consistent record of establishing a successful working relationship. Specifically, on two of the three projects for which GSA obtained a performance evaluation from the contacted references, HHN received above-average ratings for its working relationships with the owner and architect/construction manager and its commitment to problem resolution. HHN received an outstanding rating on a third contract, which it held with GSA; SSEB members familiar with HHN's performance under that contract reported that HHN displayed an "exceptionally cooperative" attitude and that there were very few change orders issued on the project and "no negative issues or conflicts with the project."

In contrast, while McHugh's references for two projects furnished above-average or outstanding ratings for working relationships and commitment to problem resolution, the GSA sources (including the SSEB chairman) contacted with respect to McHugh's performance on a GSA project for the renovation of a federal building at 536 South Clark Street in Chicago, Illinois reported a negative working relationship with McHugh and gave the firm generally below-average or poor ratings. Specifically, the SSEB chairman, who was the GSA project manager for the project, stated that there was "no indication [that McHugh] wished to help with delays or resolving problems" and concluded that the "project manager was the problem." On his evaluation worksheet under key personnel qualifications, he further indicated that McHugh's key person providing executive oversight (different from the firm's project manager) "was ineffectual on the 536 Clark project in regard to resolving problems and outstanding issues." Another past performance evaluation, completed after the filing of the protest by a GSA contractor serving in a project management function on the South Clark Street project, stated that the "[g]eneral attitude of McHugh's project management was adversarial and

opportunistic," and that "McHugh's project management was adversarial and change-order oriented."⁴ In an addendum to the final SSEB evaluation report (prepared after the protest was filed, reportedly to document the source selection process), GSA reported that change orders for the South Clark Street project "appeared high," that "McHugh was less than timely and somewhat combative in addressing potential change order situations," and that "McHugh [had an] inadequate ability to deal with tenant and project team issues." As noted above, GSA generally concluded that McHugh's past performance indicated an unwillingness by the firm to work as a team to keep costs down, the project on schedule, and the building tenants happy.⁵

McHugh argues that the agency failed to hold meaningful discussions on past performance, because it did not advise the firm of the negative information received concerning its performance on the South Clark Street project. The protester contends that if discussions had been held, it could have improved its rating in this area by: (1) discussing the alternate personnel available to assign to the project; (2) furnishing additional information concerning its past performance history with respect to milestone maintenance and problem resolution; (3) explaining how a large portion of the changes on the South Clark Street project were related to asbestos conditions that were not covered by the contract and how a renovation project such as South Clark Street differed from the proposed new construction project; and (4) otherwise discussed "steps we have taken to remedy whatever problems the GSA perceived with respect to past performance." McHugh also notes that its project manager on South Clark Street is no longer employed by McHugh. In addition, the protester asserts that GSA agreed to the changes and maintains that the project was completed on time.

Under Federal Acquisition Regulation (FAR) § 15.610(c)(6) (FAC 90-31), competitive range offerors shall be provided "an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. . . ." GSA generally asked McHugh to address the increased costs under prior projects—including the South Clark Street project—where it had indicated a change in the scope of the project, and advised McHugh of its general concern that its "excessive emphasis on documentation usually is an indication of a contractor that is claim oriented." However, GSA did not bring to McHugh's attention, or provide McHugh an opportunity to address, the negative past

⁴The agency reports that a third GSA reference, a non-voting member of the SSEB, who was the building manager at South Clark Street and who did not fill out a reference questionnaire, "also termed his experience working with McHugh as negative."

⁵GSA determined that McHugh's projects reflected a history of completion over budget, with none completed under budget, and GSA also reports that cost overruns were experienced on this project and that it was not completed on time.

performance references it had received bearing on the firm's working relationships and commitment to problem resolution on the South Clark Street project, notwithstanding that these negative reports were a significant factor in the source selection. Cf. Pacific Architects and Engineers, Inc., B-274405.2; B-274405.3, Dec. 18, 1996, 97-1 CPD ¶ 42 (discussions were adequate where agency imparted sufficient information to afford offeror a fair and reasonable opportunity to respond to the problems identified).

GSA contends that it was not required to raise this issue because FAR § 15.610(c)(6) is inapplicable to internal agency references. According to the agency, the FAR requires discussions only with respect to information obtained from third-party references, since third-party information is subject to interpretation, but does not require discussions concerning internal agency information, since such information is unlikely to be misinterpreted. In any case, argues the agency, it was not required to discuss McHugh's performance on the South Clark Street project because McHugh had a previous opportunity to comment on its performance during the course of that project, that is, because the problems on the project were "common knowledge" and "GSA expressed its dissatisfaction with McHugh's performance throughout the duration of the 536 South Clark Street project."

There is no basis to conclude that FAR § 15.610(c)(6) was inapplicable here. Nothing on the face of that FAR section (or elsewhere in the FAR) limits its application to third-party (i.e., outside the procuring agency) references; the clear language of the regulation conditions the requirement for discussions solely on whether the offeror has had an opportunity to address past performance information, and carves out no exceptions based on the source of such information. See American Combustion Industries, Inc., B-275057.2, Mar. 5, 1997 97-1 CPD ¶ 105. Neither do the statutory provisions concerning the past performance discussion requirement exempt agencies from the requirement for information generated by the agency itself. Indeed, 41 U.S.C. § 405(j)(1)(C)(i) (1994) appears to explicitly require discussion of such information. Under that provision, the Administrator for Federal Procurement Policy is to "prescribe for executive agencies guidance regarding consideration of the past contract performance of offerors in awarding contracts" that shall include policies for ensuring that "offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned. . . ." (Emphasis added.)

We also do not agree that McHugh had a previous opportunity to comment on the negative information concerning its performance on the South Clark Street contract. McHugh acknowledges that it was aware of difficulties which arose relating to asbestos conditions not covered by the contract and which it believed had been successfully overcome, and that it became aware near the end of the project (when the protester believed it was too late to replace him without disrupting and delaying

the project) of "personality conflicts" between the South Clark Street on-site project manager and GSA personnel. (As noted above, that project manager is no longer employed by McHugh.) However, the protester denies that it was notified by GSA of any problem with its overall organization regarding problem resolution, and GSA has furnished no documentary evidence that McHugh was ever notified of such a problem or that McHugh otherwise should have been aware of the problem, for example, through access to a database containing such historical performance information, or by some other such mechanism. See, e.g., United Terex, Inc., B-275962.2, May 30, 1997, 97-1 CPD ¶ 196 (agency system provided offerors access to, and an opportunity to dispute, negative historical performance data). We conclude that GSA was required to bring the negative South Clark Street project references to McHugh's attention during discussions and provide the firm an opportunity to address them.

GSA argues that, even if it failed to comply with FAR § 15.610(c)(6), McHugh was not prejudiced, and the protest should not be sustained on this basis, since the firm's suggested substitution of key personnel would not eliminate the perceived problem with the entire firm's overall negative attitude toward problem resolution.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). Based on our review of the record, which shows that because the competition was very close--with McHugh having submitted the lower cost offer and HHN enjoying only a 1.2-point scoring advantage--we cannot conclude that the protester would not have had a reasonable possibility of receiving the award but for the agency's failure to discuss references.

The record shows that the agency's concern about McHugh's ability to work as part of a team, including its commitment to problem resolution, played a critical role in the source selection decision. That concern was directly related to the unfavorable reports from the GSA references with respect to McHugh's performance on the South Clark Street project. In that context, the agency's assertion that no prejudice was caused by the failure to disclose the unfavorable reports during discussions is unpersuasive.

Disclosure of the agency's concern and discussions would have furnished McHugh the opportunity to contend, as it has here, that the past problems with the South Clark Street project were largely attributed to two key individuals and to attempt to persuade the agency that those problems should be viewed as less relevant to the evaluation of its current proposal. In light of McHugh's other references and the otherwise very close competition, we think that there was a reasonable possibility that disclosure during discussions of the negative past performance reference may

have resulted in a different source selection. In this regard, we note that McHugh's proposed cost was low and its technical score was only 1.2 points below HHN's. We conclude that McHugh was prejudiced by the inadequate discussions, and sustain the protest.

We recommend that the agency reopen discussions, request another round of BAFOs, and reevaluate proposals. If, based on this reevaluation, McHugh's proposal is found to represent the best value to the government, the agency should terminate HHN's contract--performance of which has been suspended pending the outcome of this protest--and make award to McHugh. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1997). In accordance with section 21.8(f)(1) of our Regulations, McHugh's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

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